* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRL.REV.P. 178/2007

April 17, 2007

BANSIL MUTEI SHIBLAQ ..... Petitioner
Through Mr. Rajiv Nayar, Sr. Advocate with
Ms.Ritu Bhalla, Mr. Sidharth Luthra, Ms. Smriti Sinha,
Advocates

versus

UOI & ORS ..... Respondents
Through Mr. A.K. Vali, Mr. Baldev Malik, Advocates
for the UOI.
Mr. R.M. Tiwari, Advocate for the Interpol.

CORAM:

Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the judgment should be reported in the Digest? Yes

Mr. Justice S. Ravindra Bhat (Open Court)

1. The petitioner invokes the revisional jurisdiction of this court, under Section 397 of the Code of Criminal Procedure (hereafter "the Code"). He is aggrieved by the order of the Additional Chief Metropolitan Magistrate (ACMM) dated 21-3-2007, rejecting his application for discharge under Section 34-B (2) of the Extradition Act, 1962 (hereafter "the Act").

2. The facts necessary to decide the petition are that the petitioner, a UK national, professes to have an unblemished record. He was detained pursuant to a "Red Corner Notice" issued by the Interpol, on account of a request by the Government of the UAE. He claims to have visited India, with one Peter Simon, chairman of M/s Monsoon Ltd, UK, a well known international fashion brand, in connection with some charity work. Upon his landing at the Indira Gandhi International Airport, he was detained, on the the basis of a "Look Out circular" (LOC) issued by the Foreigners Regional Registration Office, issued pursuant to the red corner notice. The detention took place on 7-1-2007.

3. After his detention, the petitioner caused a legal notice to be issued to the Ministry of External Affairs, of the Government of India, detailing the various circumstances that led to the red corner notice. Apparently he had acted as investment adviser to a financial company, under the direct control of the Department of Private Affairs of Abu Dhabi. Certain allegations of fraud were levelled in relation to those dealings; these led to claims being preferred before the courts in UK. The charges of fraud were not pressed; initially, the petitioner was held liable to pay some amounts. He carried the matter in appeal in the U.K. Courts, and his counter claim/appeals were allowed. As a consequence, the financial arm of Abu Dhabi, which had preferred the claim, was adjudged liable. In the meanwhile, the Government of UAE apparently held criminal proceedings

in absentia, and secured a judgment declaring him guilty. Consequently, a red corner notice was issued. The petitioner was detained in South Africa, and Canada, and on both occasions, the local authorities, after considering all the facts, released him.

4. The petitioner moved an application for bail, which was considered, and rejected by the ACMM, through a detailed order on 10-1-2007. Subsequently, this court, after considering various issues and materials, directed release of the petitioner on interim bail. The court reasoned that by virtue of Article 10(3) of the Extradition treaty between the Government of UAE and the Indian Government, the latter was empowered to release the fugitive criminal (i.e the petitioner) before the expiration of the period under Section 34(2) of the Act, and that the circumstances of the case justified his release, on conditions spelt out in the order.

5. After the issuance of the said order, the petitioner moved the learned ACMM, for discharge under Section 34(2). That order was rejected by the impugned order. The relevant and material part of the order reads as follows:

> *"in the present case there had been no request from any foreign state foreign state for the immediate arrest of the fugitive criminal and in fact the fugitive criminal had been arrested admittedly on the basis of red corner notice of the interpol as discussed above hence, the question of the provisions of Section 34B (3) having come into operation does not arise. In this background the question of discharge of the fugitive criminal under section 34B (2) expiration of 60 days if no request of his surrender has been received during this period would only be relevant in those case where the provisional*

warrant for the arrest of the fugitive criminal are obtained from the Magistrate by the Central Government. Hence, I do not find any merit in th request made by the applicant/fugitive criminal. Lastly it is an admitted case that till date no request has been received from the UAE Government. The provisions of Article 10 of the Indo-UAE Treaty provides that it is the duty of the requesting State to take all necessary measures to prevent the escape of such an applicant/fugitive criminal and release of such a person shall not prevent his re-arrest and extradition, if the request for extradition is completed afterwards. Hence a total discharge of the accused as demanded by him would be in clear contravention of the above provisions. In view of the above discussion application of the fugitive criminal is hereby dismissed.

However, this court may observe that the provisions of Article 21 of the Constitution of India which provides that "no person shall be deprived of his right or personal liberty except for the procedure established by law" would apply even to persons who are not Indian citizens which includes the present applicant/fugitive criminal. This court has observed that the applicant before this court is an UK National and is not a resident of India and curtailing his liberty for an indefinite period and an inordinate delay of bring the applicant/fugitive criminal to proper enquiry certainly violates the provisions of Article 21 of the Constitution of India. Under these circumstances it is desirable that the Ministry of External Affairs should raise this issue through its channels with the Contracting State i.e. UAE in order to ascertain the status of the request qua the present applicant. This should preferably be done at the earliest and a report should be filed before this court on the next date of hearing.

Admittedly the fugitive criminal/applicant is a UK citizen. He has no residence in India and hence it would be inappropriate to detain him for indefinite period as it would serve no useful purpose. Needless to say in case if no information is received from th requesting state till he next date of hearing it shall be open to the applicant/fugitive criminal to apply for suitable modification of the condition of his bail before the competent court so as to enable him to leave for his country on the condition of reporting back as and when request is so received or as an when so directed by this Court. A copy of this order be given to the counsel for UOI for compliance.

Be listed 09.04.07."

6. Mr. Rajiv Nayyar, learned senior counsel for the petitioner urged that the trial court erred in holding that the arrest was not pursuant Section 34-B(1). He relied on the impugned order, which in no uncertain terms had recorded that the Central Government did move for the petitioner's detention under that provision. Reliance was placed upon two Division Bench judgments of this court, in *Flemming Lunding Larsen -vs- Union of India & Anr.* 72(1998) DLT 80, and *Pragnesh Desai -vs- Union of India* 2004 (73) DRJ 84 to say that with the expiry of the statutorily prescribed period, the individual had a vested right to be discharged, if no request was received from the requesting country.

7. Learned counsel submitted that there were only three situations where a fugitive criminal could be detained under the Act, as held in *Flemming's case*. The petitioner's case clearly fell under the category of arrest pursuant to a request by a foreign government, as a red corner Interpol notice was the basis of the arrest. The red corner notice was premised upon the information and request of the Government of UAE; there was no other notice. Counsel submitted that the court erred in holding that the arrest was not under Section 34-B.

8. It is urged that the learned ACMM fell into error in holding, as she did, that the petitioner's provisional arrest not having been made under Section 34-B(1), he could not avail the benefit of Section 34-B(2). Counsel submitted that the question of a so-called “harmonious” interpretation of the provisions on the basis of a

perceived conflict between the provisions of the Act, and the Indo UAE treaty did not arise, and could not be the basis of continued detention, specially when the Central Government never desired the detention of the petitioner, and had expressly stated that the arrest was under Section 34-B (1).

9. It was urged that the ACMM committed a grave impropriety, by proceeding beyond the confines of the case, in directing the Government of India, to seek information from the Government of UAE. Once the court was of the opinion that the petitioner was disentitled to relief, the matter ended; it did not possess jurisdiction to issue directions, having become *functus officio,* in such proceedings. Learned counsel went to the extent of contending that the approach and directions of the ACMM were not only jurisdictionally improper, but grossly perverse, and that this court ought to issue strictures.

10. Mr. Vali, learned counsel for the respondent submitted that as per the reply filed, the allegations against the petitioner were that he was involved in offences of misappropriation of amounts totaling Rs. 1,31,88,12,047/-. The Central Government had already informed the Government of the U.A.E. about the arrest of the petitioner.

11. Learned counsel submitted that too much cannot be read into the reasoning of the trial court about inapplicability of Section 34-B(2), since the continued detention was sought for under Section 34-B(1). Learned counsel submitted that

the trial court's impression that detention was not under that provision was incorrect.

12. The relevant provision, namely, Sections 34-B(1) reads as follows:

> *"34-B. Provisional Arrest---(1) On receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.*
>
> *(2) A fugitive criminal arrested under Sub-section (1) shall be discharged upon the expiration of sixty days from the date of his arrest if no request for his surrender or return is received within the said period."*

13. Two Division Bench judgments of this Court, namely, i.e *Flemming's case* and *Pragnesh Desai's case* have considered the effect of the said provision. In *Flemming's* case, (supra) the court held as follows:

> "*8. Under the Scheme of the Act, a fugitive criminal can be put under arrest under three circumstances: firstly when an order is issued by the Central Government under Section 4 of the Act to the Magistrate for making an enquiry into the offence, on receipt of such an order of the Central Government the Magistrate is empowered to issue warrants for the arrest of fugitive criminal and thereafter to proceed to make necessary enquiry as per the procedure laid down in Section 7 of the Act; the second eventuality under which arrest of a fugitive criminal can be made is under Section 9 of the Act when it appears to any Magistrate that a person within the local limits of his jurisdiction is a fugitive criminal of a foreign State, he may issue a warrant for his arrest. The Magistrate thereafter is re- quired to report to the Central Government the fact of issuance of war- rants. Such a person cannot be detained for more than 90 days unless within the said period the Magistrate receives from the Central*

Government an order made with reference to such a person under Section 5 of the Act; the third category is the provisional arrest as provided in Section 34B of the Act, which is made on the basis of an urgent request from a foreign State for immediate arrest of a fugitive criminal. On receipt of such a request the Central Government may request the Magistrate of competent jurisdiction to issue provisional warrant for the arrest of such fugitive criminal. Discharge of such fugitive criminal on expiry of the period of sixty days is mandatory under Sub-section (2) of Section 34-B, if no request is made for his surrender or return within the said period. The question in this case is that whether request for surrender or return has to be received by the Magistrate from the Central Government or by the Central Government from a Foreign State. Section 34-B of the Act reads as under:

> *"34-B. Provisional Arrest---(1) On receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.*

(2) A fugitive criminal arrested under Sub-section (1) shall be discharged upon the expiration of sixty days from the date of his arrest if no request for his surrender or return is received within the said period."

9. Only Section 4 of the Act deals with the requisition for surrender or return of a fugitive criminal, which reads:

> *"4. Requisition for surrender--A requisition for the surrender of a fugitive criminal of a foreign State or a foreign State may be made to the Central Government---*
>
> *(a) by a diplomatic representative of the foreign State at Delhi; or*
>
> *(b) by the Government of that foreign State communicating with the Central Government through its diplomatic representative in that State or country;*

and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of the foreign State with the Government of India."

10. Only on the basis of a request made in consonance with Section 4 of the Act for surrender of a fugitive criminal that the Central Government is to have the enquiry conducted through Magistrate for which purpose the Central Government is required to pass an order to the Magistrate under Section 5 of the Act directing him to make an enquiry. The procedure to be followed by a Magistrate is laid down in Section 7 of the Act. In case after enquiry the Magistrate holds that a prima facie case is not made out, the fugitive criminal is to be discharged as provided in Sub-section (3) of Section 7 of the Act. In case prima facie case is held to have been made out in support of the requisition of the foreign State, the fugitive crimi- nal is to be committed to prison to await the orders of the Central Govern- Government for which purpose the Magistrate is to report the result of the en- quiry to the Central Government as envisaged in Sub-section (4) of Section 7 of the Act..."

14. Likewise, in *Pragnesh Desai's* case, the Division Bench speaking of Sections 34-B(2) held that it

"*...provides that if no request for surrender or return of a fugitive criminal is received within sixty days of his provisional arrest under Sub-section (1), he shall be discharged upon the expiry of the said period. It is evident that Sub-section (1) is an urgency provision for the purpose of putting a fugitive criminal under provisional arrest, pending receipt of a request for his surrender or return, so that he does not flee in the meanwhile. The mandatory stipulation of discharge of the person detained upon the expiry of sixty days from the date of his arrest is a safeguard against keeping the liberty of a person in suspended animation for an indefinite period without any accusation or complaint etc. It is clear that the Section does not postulate that a request for surrender or return of a fugitive criminal*

has to be only after fugitive's provisional arrest. In other words, provisional arrest of a fugitive under Sub-section (1) is not a condition precedent for a request for his surrender to the requesting country. It is equally not mandatory that a request for immediate arrest under Sub-section (1) must precede a requisition for surrender of a fugitive criminal either under Chapter II, which lays down the procedure for extradition of fugitive criminals to foreign State, with which there is no extradition arrangements or Chapter III of the Act, which sets out the procedure for return of fugitives to foreign States with extradition arrangements, as in the present case..."

15. From the above factual narrative it is clear that the petitioner was arrested, on the basis of a Red Corner notice at the request of the UAE Government, was issued sometime in 2000. The detention was made on 7.1.2007. The petitioner's bail application was rejected. Thereafter, the Central Government again sought for extension of his remand, by moving under Section 34-B(1) of the Act. As explained in *Flemming's* case, the Act envisages detention of a fugitive criminal under three circumstances:

(i) Order by the Central Government under Section 4 of the Act, making reference to a Magistrate for enquiry into the offence. In such an event, the Magistrate can issue warrant for arrest and then proceed with the enquiry according to Section 7;

(ii) Arrest pursuant to warrant issued by a Magistrate under Section 9 of the Act, if it appears to him that a person within his jurisdiction is a fugitive criminal of a foreign State;

(iii) Provisional arrest under Section 34-B on the basis of urgent request for a foreign State for the immediate arrest of the fugitive.

16. In this case, the first two situations did not and could not have arisen because there is no reference by the Central Government in terms of Section 4. Likewise, the petitioner was not arrested pursuant to a warrant issued by a Magistrate, under Section 9. He was detained, on the basis of the Red Corner notice when he landed in New Delhi on 7.1.2007. Therefore, his detention clearly fell within description under Section 34-B. In fact, the learned CMM in her order has recorded that after arrest, the petitioner was remanded at the behest of the Central Government under Section 34-B. This is apparent from the narrative in the impugned order in the second paragraph:

> "*On the same date, i.e 8.1.2007 when the applicant was produced before this court he was remanded to judicial custody for seven days and stand of the MEA even before this court that the remand was under Section 34-B..*"

Though the trial court noticed this aspect, subsequently, the impugned order proceeded on the footing that there was no request by any foreign State for the immediate arrest of the fugitive criminal and, therefore, application of Section 34-B(2) did not arise. Likewise, the finding that the detention was not in furtherance of any provisional warrant for arrest under Section 34-B(1) of the act is contrary to the expressed stand of the Government itself.

17. In the light of the express provisions of Section 34-B(2) and the law declared by this Court in the decisions in *Flemming (supra)* and *Pragnesh Desai (supra)*, the conclusion of the trial court that the Section 34-B(2) was inapplicable, cannot be sustained. Equally, there is nothing in law to support the perceived conflict between Article 10 of the Treaty (between the Government of UAE and Republic of India) and the express terms of Section 34-B(2). In fact, assuming there to be a conflict, the question of a court preferring the terms of a statutory mandate, to a treaty, cannot arise. Section 34-B, to that extent, enacts a non-derogable standard, which cannot be ignored. Therefore, I am of the opinion that the conclusions arrived at by the ACMM cannot be sustained and they have to be set aside.

18. Learned counsel for the petitioner had vehemently submitted that the learned ACMM overstepped the limits of jurisdiction in directing the Central Government to elicit a response from the Government of UAE and that the Court ought not to have indulged in such adventurism as it had no authority to do so. Learned counsel even went to the extent of stating that this is an appropriate case where some kind of adverse comments or strictures are called for and characterised the approach of the trial court as unreasonable and untenable.

19. In the preceding part of this order, the findings of the trial court have been

set aside. The approach of the trial court in this case, in virtually directing the Central Government to elicit a response, through diplomatic and other channels as it were, and report back to it, was no doubt without jurisdiction and uncalled for. That that extent, of course, the petitioner is perhaps justified in complaining as he does that the directions were not sustainable. All that can be said is that the Courts are to exercise their jurisdiction and powers in accordance with law and judges discharge their duties to achieve that end and not to achieve any other purposes, howsoever laudable it may be from a subjective standpoint. Although it may tempting for this Court to make an adverse comment about the procedure adopted by the trial court, and its approach, such a course is not justified in the present case. The order to the extent it directed the Central Government to take steps, was perhaps an overzealous reaction. Therefore, the course suggested by the counsel for the petitioner would not be called for, particularly, in the light of the decision of the Supreme Court in *K.P. Tiwari vs. State of Madhya Pradesh,* AIR 1994 SC 1031 and in *"K", a Judicial Officer* reported in 2001 (3) SCC 54. In the latter decision, the Supreme Court held as follows:

> *"The strength of power is not displayed solely in cracking a whip on errors, mistakes or failures; the power should be so wielded as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly. "Pardon the error but not its repetition." The power to control is not to be exercised solely by wielding a teacher's cane; the members of subordinate judiciary look up to the High Court for the power to control to be exercised with parent-like care and affection. The exercise of statutory jurisdiction,*

appellate or revisional and the exercise of constitutional power to control and supervise the functioning of the district Courts and Courts subordinate thereto empowers the High Court to formulate an opinion and place it on record not only on the judicial working but also on the conduct of the judicial officers. The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied, however, the High Courts have to remember that criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities."

20. In the facts of this case, even though I am of the opinion that the Court acted beyond jurisdiction in directing the Central Government to elicit responses from a foreign country and further seeking a report, I am of the opinion that no further comment is called for.

21. In view of the above findings and conclusion recorded in the preceding paragraphs, the petition is entitled to succeed. Accordingly, the impugned order is hereby set aside. The petitioner's passport is directed to be released forthwith. The bail bonds furnished by him are hereby cancelled; the petitioner is at liberty to take back the fixed deposit receipts. The Look Out Circular No. 200102351 is hereby set aside/quashed.

22. The petition is allowed in the above terms. Order Dasti under the signatures of the Court Master.

17th April, 2007 S.RAVINDRA BHAT, J
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